IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

RONALD WATSON LAFFERTY, Petitioner, vs. STATE OF UTAH, Respondent.	CASE NUMBER: 020404472 DATED: NOVEMBER 29, 2005 **RULING ON MOTION TO DISMISS AND FOR PARTIAL SUMMARY JUDGMENT** ANTHONY W. SCHOFIELD, JUDGE

This case is before the court on Respondent's Motion to Dismiss and for Partial Summary Judgment. Having thoroughly reviewed the parties' memoranda, relevant case law, previous rulings in the case, and all applicable statutory provisions, and having considered the oral arguments presented by counsel at the hearing held October 6, 2005, I now issue this ruling granting Respondent's motion.

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PROCEDURAL HISTORY

Following a jury trial in May 1985, Petitioner was convicted of two counts of first degree murder, two counts of aggravated burglary, and two counts of conspiracy to commit first degree murder. Pursuant to statute, a sentencing hearing was convened after which the jury returned a verdict of death on each of the first degree murder convictions. Petitioner subsequently appealed his conviction and death sentence to the Utah Supreme Court. On January 11, 1988, the Court issued its decision rejecting all of Petitioner's challenges. *See State v. Lafferty*, 749 P.2d 1239 (Utah 1988) (*Lafferty I*). Petitioner did not seek state collateral review of his conviction and sentence, but opted instead to file a petition for writ of habeas corpus in the United States District Court for the District of Utah. This petition was denied by the federal district court and Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit Court reversed the district court and granted Petitioner's writ of habeas corpus, thereby vacating his conviction and sentence. It concluded that the state trial court had relied upon an incorrect legal standard in evaluating Petitioner's competency. *See Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991).

Respondent thereafter chose to retry Petitioner for the offenses originally charged against him. In April 1996, Petitioner was again convicted of two counts of first degree murder, two counts of aggravated burglary, and two counts of conspiracy to commit first degree murder. Following a sentencing hearing, the jury returned verdicts of death on each of the first degree murder convictions. Petitioner then appealed his conviction and death sentence to the Utah Supreme Court. The Supreme Court affirmed Petitioner's conviction and sentence, *see State v. Lafferty*, 2001 UT 19, 20 P.3d 342 (*Lafferty II*). The United States Supreme Court denied

review. *See Lafferty v. Utah*, 534 U.S. 1018 (2001).

On October 10, 2002, Petitioner filed his Preliminary Petition for Habeas Corpus and/or Post-Conviction Relief in this court. On October 29, 2004, Petitioner filed his Second Amended Writ of Habeas Corpus, Parts 1 and 2, raising numerous claims challenging his conviction and death sentence. In response, on February 23, 2005, Respondent filed the motion now at issue. Petitioner filed his opposition to the motion on May 16, 2005. On June 20, 2005, Respondent filed its reply. On October 6, 2005, the court received oral argument on the motion.

SUMMARY OF THE PARTIES' ARGUMENTS

Petitioner's second amended petition first raises a claim for relief based upon newly discovered evidence. Petitioner asserts that he has new evidence of perjury or inconsistent testimony by Dr. Stephen Golding, who was one of the forensic psychologists that evaluated Petitioner as part of the competency determination. According to Petitioner, during his competency hearings, Dr. Golding specifically stated that Petitioner could be found "situationally competent," that is, competent in some situations, but not competent in others. However, in recent competency hearings held in the case of *State v. Brian Mitchell*, case no. 031901884 (3rd District Court, Salt Lake County, State of Utah), Petitioner claims that Dr. Golding testified that situational competence is not a viable diagnosis.

Additionally, Petitioner also raises forty-seven separate claims challenging the legality of his conviction and the sentence of death imposed upon him. These claims include (1) error by the trial court in denying the motion for change of venue; (2) errors committed during the jury selection process; (3) errors concerning the penalty phase jury instructions and verdict forms; (4)

errors committed by the trial court with respect to the admission of evidence; (5) challenges to Utah's capital decision-making process; (6) error committed by the trial court in finding that Petitioner was competent to proceed; (7) error committed by the trial court in failing to sequester the jury; and (8) cumulative error. In addition, Petitioner raises several claims of ineffective assistance of both trial counsel and appellate counsel. These ineffectiveness claims generally challenge the qualifications of both trial and appellate counsel. Moreover, there is also an ineffectiveness claim challenging the qualifications of post-conviction counsel.

Based upon the claims he raises, Petitioner asks that I grant him sufficient funds to pay for counsel and to hire necessary and appropriate experts and investigators to prepare for an evidentiary hearing on these issues and that I thereafter conduct a hearing to allow him to present evidence in support of his contentions. Ultimately, he desires that I "[a]llow a Writ of Habeas corpus to have the Petitioner brought before the Court so he might be discharged from his illegal and unconstitutional confinement and restraint, and/or relieved of his illegal and unconstitutional sentence of death." Second Am. Pet. at 25.

In addition to the foregoing claims, Petitioner requested counsel to attach a Second Amended Writ of Habeas Corpus Part 2, apparently written by Mr. Lafferty himself, in which he raises the following claims: (1) evidence was planted at the trial proceedings by the prosecution; (2) his second trial violated his protection against double jeopardy; (3) after the Tenth Circuit Court of Appeals vacated Petitioner's first conviction and death sentence, Respondent failed to arrest, re-charge, or properly arraign him on the current charges; and (4) his counsel erroneously advised him not to file a 120-day disposition request. Based upon these claims, Petitioner requests the court to immediately release him from custody and order monetary relief and

redress in the amount of thirty-five million dollars.

Respondent argues that summary judgment is appropriate on all of Petitioner's claims. According to Respondent, many of Petitioner's claims are procedurally barred pursuant to the Post-Conviction Remedies Act (PCRA) because they either were previously raised and rejected on direct appeal or they are claims that could have been raised on direct appeal, but were not. With respect to the other claims, Respondent contends that Petitioner has failed to plead or establish the existence of sufficient facts to support the claims and to grant him sufficient funds to pay for counsel and hire the necessary and appropriate experts and investigators .

LEGAL ANALYSIS

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). The Utah Supreme Court has held that,

> [i]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble[,] and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.

Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). Indeed, any showing in support of summary judgment "must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor." *Bullock v. Deseret Dodge Truck Ctr.*, 354 P.2d 559, 561 (Utah 1960). *See also Burningham v. Ott*, 525 P.2d 620, 621 (Utah 1974) (same). "Only when it so appears, is the court justified in refusing such a party

the opportunity of presenting his evidence and attempting to persuade the fact trier to his views." *Holbrook*, 542 P.2d at 193. However, if the party moving for summary judgment satisfies his burden of "informing the trial court of the basis for the motion and identifying the portions of the pleadings or supporting documents which it believes demonstrates an absence of a genuine issue of material fact," *TS 1 Partnership v. Allred*, 877 P.2d 156, 158 (Utah Ct. App. 1994), then the opposing party cannot simply "rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Utah R. Civ. P. 56(e).

In considering a motion for summary judgment in the context of a petition for post-conviction relief, the court is obligated to bear in mind that a "petition for post-conviction relief . . . collaterally attacks a conviction and/or a sentence. It is not a substitute for direct appellate review." *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994). Thus, "[i]ssues raised and disposed of on direct appeal of a conviction or a sentence cannot properly be raised again in a [post-conviction petition] and should be dismissed as an abuse of the writ without a ruling on the merits." *Id. See also* Utah Code Ann. § 78-35a-106(1)(b). In addition, "issues that could and should have been raised on direct appeal, but were not, may not be raised for the first time in a [post-conviction] proceeding," *Carter v. Galetka*, 2001 UT 96, ¶6, 44 P.3d 626 (*Carter I*), unless the petitioner can demonstrate that "the failure to raise [these issues] was due to ineffective assistance of counsel." Utah Code Ann. § 78-35a-106(2). Finally, when claims of newly discovered evidence are raised, relief can be granted only if the petitioner, or his counsel, was not, and could not have been, aware of the evidence at the time of trial or sentencing and it can

be shown that the new evidence is not merely cumulative, is not simply impeachment evidence, and that, when all the other evidence is taken into consideration, no reasonable trier of fact could have found the petitioner guilty of first degree murder or returned a verdict in favor of the death penalty. *See* Utah Code Ann. § 78-35a-104(1)(e)(i)-(iv).

With respect to Petitioner's claims that allege ineffective assistance of trial counsel, in order to prevail he must demonstrate that there is a genuine issue of material fact with respect to each prong of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984): (1) that counsel's performance was constitutionally deficient and (2) that the deficient performance prejudiced the defense. *Id.* at 686. *See also Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988) (to prevail on a claim of ineffective assistance of counsel, "a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant."); *State v. Geary*, 707 P.2d 645, 646 (Utah 1985) (to show ineffective assistance of counsel, a petitioner must prove "(1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error."). However, as the Supreme Court noted in *Strickland*, "counsel is strongly presumed to have rendered adequate assistance," *Strickland*, 466 U.S. at 690, 696, and there is also a strong presumption that the outcome of the particular proceeding is reliable.

Under the first prong of the test, an attorney's performance is deficient if he has "made errors so serious that [he] was not functioning as the 'counsel' guaranteed [a] defendant by the Sixth Amendment." *Id.* at 687. The seriousness of any errors is judged by whether counsel's

representation was unreasonable under prevailing professional norms. *Id.* at 688. In this context, the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 691. *But see Rompilla v. Beard*, 125 S. Ct. 2456, 2466-68 (2005) (holding that even if a defendant suggests that no mitigating evidence is available, trial counsel is required to review material he knows the prosecutor will rely on as evidence in aggravation).

In challenging counsel's effectiveness, a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*. at 690. In making this determination, fairness requires "that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Moreover, the assessment of counsel's performance cannot be based upon "what is prudent or appropriate, but only [upon] what is constitutionally compelled." *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984). In addition, the Supreme Court has specifically noted that,

> [j]udicial scrutiny of counsel's performance must be highly deferential. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689.

Concerning the second prong of the test, even if an attorney's representation is found to be unreasonable under prevailing professional norms, a claim of ineffective assistance of counsel will nevertheless fail if the errors committed by counsel had no effect on the outcome of the criminal proceeding. *Id.* at 691. Thus,

> [it] is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Id. at 693. A petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[1] *Id.* at 694.

The United States Supreme Court has also held that the effective assistance of appellate counsel is a right guaranteed by the Due Process Clause of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Whether an appellate counsel's performance is ineffective is judged by the same standard that applies to judging the ineffectiveness of trial counsel. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) ("[T]he proper standard for evaluating [petitioner's] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*."). *See also Bruner v. Carver*, 920 P.2d 1153, 1157 (Utah 1996) ("The standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel."). This standard requires Petitioner to "first

[1] This showing is greater than simply demonstrating "that the errors had some conceivable effect on the outcome of the proceeding," but less than demonstrating "that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

show that his counsel was objectively unreasonable in failing to find arguable issues to appeal--that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Robbins*, 528 U.S. at 285. If Petitioner "succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.*

In considering the issue of ineffective assistance of appellate counsel in the context of a post-conviction petition, the Utah Supreme Court, in *Carter I*, cited to a Tenth Circuit case which held that

> [w]hen a . . . petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue. Failure to raise an issue that is without merit "does not constitute constitutionally ineffective assistance of counsel" because the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal. Thus, counsel frequently will "winnow out" weaker claims in order to focus effectively on those more likely to prevail. However, an "appellate advocate may deliver deficient performance and prejudice a defendant by omitting a 'dead-bang winner,' even though counsel may have presented strong but unsuccessful claims on appeal."

Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995) (quoting *United States v. Cook*, 45 F.3d 388, 393, 395 (10th Cir. 1995)). *See also Carter I*, 2001 UT 96 at ¶48.

The Tenth Circuit initially defined a claim as a "dead-bang winner" if it "was obvious from the trial record . . . and . . . *would have resulted* in a reversal on appeal." *Cook*, 45 F.3d at 395 (emphasis added). According to the court in *Cook*, "[b]y omitting an issue under these circumstances, counsel's performance is objectively unreasonable because the omitted issue is obvious from the trial record. Additionally, the omission prejudices the defendant because had counsel raised the issue, the defendant would have obtained a reversal on appeal." *Id.* The Utah

Supreme Court, however, did not adopt this language. Rather, the *Carter I* Court adopted language from the *Banks* decision which defined "dead-bang winner" "as an 'issue which is obvious from the trial record and one which *probably* would have resulted in reversal on appeal.'" *Carter I*, 2001 UT 96 at ¶48 (emphasis added) (quoting *Banks*, 54 F.3d at 1515 n.13). The fact that the *Carter I* Court adopted the "probably would have resulted" language instead of the "would have resulted" language is important because the "probably would have resulted" language is consistent with the United States Supreme Court's holding noted above that it is the *Strickland* standard that applies to claims of ineffective assistance of appellate counsel. *See Robbins*, 528 U.S. at 285. Indeed, in a recent decision the Tenth Circuit held that

> [t]o the extent [the "dead-bang winner"] language can be read as requiring the defendant to establish that the omitted claim would have resulted in his obtaining relief on appeal, rather than there being only a reasonable probability the omitted claim would have resulted in relief, this language conflicts with *Strickland*. The en banc court, therefore, expressly disavows the use of the "dead-bang winner" language to imply requiring a showing more onerous than a reasonable probability that the omitted claim would have resulted in a reversal on appeal.

Neill v. Gibson, 278 F.3d 1044, 1057 n.5 (10th Cir. 2001).

The standard for judging the effectiveness of appellate counsel embodied in the phrase "dead-bang winner" is identical to the standard enunciated in *Strickland*. Therefore, in order for a petitioner to avoid summary judgment on any claims that allege ineffective assistance of appellate counsel, he must demonstrate that there is a genuine issue of material fact with respect to each prong of the "dead-bang winner" standard: (1) that appellate counsel failed to raise an issue which was obvious from the trial record and (2) that the issue is one which probably would have resulted in reversal on appeal.

ANALYSIS AND RULING[2]

I. Claims Previously Raised and Rejected on Direct Appeal.

All of the following claims were raised and rejected on direct appeal:

1) Claims 4, 14, and 18 (partial) addressing the issue of burden-shifting at the penalty phase, *see Lafferty II*, 2001 UT 19 at ¶¶127-28;

2) Claim 7 challenging the removal of juror 220, *see id.* at ¶¶58-64;

3) Claim 8 challenging the trial court's decision to admit the crime scene videotape, *see id.* at ¶¶79-84;

4) Claim 9 challenging the trial court's decision to admit the videotape of Petitioner's media interview, *see id.* at ¶¶98-107;

5) Claim 10 challenging the trial court's decision to deny Petitioner's proposed mercy and sympathy instruction, *see id.* at ¶¶108-112;

6) Claim 21 addressing the double jeopardy issue, *see id.* at ¶¶142-149;

7) Claim 32 (partial) addressing the issue of prosecutorial discretion in charging capital murder, *see id.* at ¶¶140-41;

8) Claim 43 challenging the trial court's finding that Petitioner was competent to proceed to trial, *see id*. at ¶¶45-51; and

9) Claim 45 challenging the trial court's denial of Petitioner's motion for a new trial, *see*

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[2] Throughout his second amended petition, Petitioner refers to both state and federal constitutional provisions in asserting his claims. During oral argument, he specifically requested that the court provide an independent analysis of his claims under both state and federal law. However, Petitioner does not proffer any explanation as to how the court's analysis under the federal constitution should differ under the state constitution. Therefore, consistent with the Utah Supreme Court's approach, this court will not "embark on an independent analysis under the Utah Constitution when the parties had neither argued for nor briefed a separate analysis." *State v. Trane*, 2002 UT 97, ¶21, 57 P.3d 1052.

id. at ¶¶52-57.

Unless "there has been an intervening change of controlling authority, . . . new evidence has become available, or . . . [the Utah Supreme Court's] prior decision was clearly erroneous and would work a manifest injustice," *Gildea v. Guardian Title Co. of Utah*, 2001 UT 75, ¶10, 31 P.3d 543, "when a legal 'decision [is] made on an issue during one stage of a case,' that decision 'is binding in successive stages of the same litigation.'" *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶67, 82 P.3d 1076 (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). *See also AMS Salt Indus. v. Magnesium Corp. of Am.*, 942 P.2d 315, 319 (Utah 1997) ("One branch of the doctrine stands for the general rule that 'one district court judge cannot overrule another district court judge of equal authority.'" (quoting *Mascaro v. Davis*, 741 P.2d 938, 946 (Utah 1987)). Petitioner has not demonstrated that any of the foregoing exceptions apply in this case.

Because the foregoing claims raised by Petitioner duplicate claims that were raised and rejected on direct appeal,[3] it follows that these claims are procedurally barred pursuant to Section 78-35a-106(1)(b). Respondent is entitled to summary judgment dismissing these claims.

II. Claims That Could Have Been Raised on Direct Appeal But Were Not.

With respect to all of the following claims, sufficient facts were available to Petitioner at the time of his direct appeal that he could have raised these claims before the Utah Supreme

[3] Respondent also argues that claim 23, addressing the issue of trial counsel's ineffectiveness for failure to hire a mitigation expert, claim 38, which asserts that Utah's death penalty scheme is unconstitutional because it creates a presumption of death, and claim 41, which asserts that the death penalty as applied to Petitioner is unconstitutional because it violates human dignity and serves no penological interest, also were raised on direct appeal and rejected and thus are procedurally barred. However, it does not appear to the court that the issues raised in these claims were specifically presented on appeal. They therefore are not procedurally barred on the grounds Respondent asserts.

Court, but he chose not to do so:

1) Claim 1 challenging the constitutionality of certain parts of the Utah capital sentencing statute;

2) Claims 2, 3, 15, 16, 18 (partial), and 19 challenging the penalty phase instructions and verdict forms;

3) Claim 5 challenging the process of death qualification during jury selection;

4) Claim 6 challenging the trial court's denial of Petitioner's motion for change of venue;

5) Claim 11 (partial) challenging the trial court's decision preventing Petitioner from admitting a number of mitigating circumstances at the penalty phase;

6) Claim 12 (partial) challenging the trial court's decision not to sequester the jury;

7) Claim 13 challenging the reasonable doubt instruction given at both the guilt and penalty phases of the trial;

8) Claim 17 asserting that insufficient evidence was presented at the penalty phase to support the aggravating circumstance that the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner;

9) Claim 18 (partial) asserting that jurors were naturally disposed to imposing a death sentence at the penalty phase because they had already found the existence of at least one aggravating factor at the guilt phase;

10) Claim 20 (partial) addressing the issue that, after the Tenth Circuit Court of Appeals vacated Petitioner's conviction and sentence, he was not arrested on a warrant, but simply transferred from the Utah State Prison to the Utah County Jail;

11) Claim 30 asserting that Petitioner's constitutional rights were violated when the prosecution argued that Petitioner murdered one and perhaps both of the homicide victims after already having argued at Petitioner's co-defendant's trial that the co-defendant had committed both murders;

12) Claims 32 (partial) and 47 challenging the constitutionality of Section 76-5-202;

13) Claims 33, 35, 37, and 38 challenging the constitutionality of Utah's death penalty scheme;

14) Claims 34 and 41 challenging the constitutionality of the death penalty;

15) Claim 42 asserting that the cumulative effect of the numerous errors committed during Petitioner's trial violated his rights to due process and a fair trial; and

16) Claim 46 challenging the constitutionality of Utah's insanity defense statute and asserting that the trial court improperly relied on the 1995 version of the statute rather than the 1984 version, which was in effect at the time the homicides were committed.

Petitioner argues in his opposition memorandum that the foregoing claims were not raised on appeal because appellate counsel was ineffective. Indeed, according to Petitioner, the fact that these claims were not raised is clear evidence that appellate counsel was not performing effectively. Therefore, Petitioner argues, these claims are not procedurally barred and should be considered by the court.

In my view, however, claiming that the foregoing issues were not raised on appeal because appellate counsel was ineffective amounts to a new claim that was not previously raised in Petitioner's second amended petition, and raising new claims in a memorandum opposing summary judgment is improper. *See Holmes Development, LLC v. Cook*, 2002 UT 38, ¶31, 48

P.3d 895 ("A plaintiff cannot amend the complaint by raising novel claims or theories of recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah's pleading requirements."). Nevertheless, even if the court did not view the ineffective assistance of appellate counsel claim as a new post-conviction claim, Petitioner still is not entitled to the relief he seeks. In order to avoid summary judgment with respect to whether appellate counsel was ineffective in failing to raise these claims, he must show that there is a genuine issue of material fact with respect to whether appellate counsel failed to raise an issue which was obvious from the trial record and which probably would have resulted in reversal on appeal. *See Carter I*, 2001 UT 96 at ¶48.

Petitioner has not alleged any facts in support of his ineffective assistance of appellate counsel claim other than simply to state that the failure to raise these claims on appeal demonstrates that appellate counsel was ineffective. However, merely raising these claims in his petition without an adequate factual record to support them does not demonstrate that these issues were obvious from the trial record and probably would have resulted in reversal on appeal. That is the burden which Petitioner must meet but which he failed to meet.

From my view of the record, sufficient facts were available to Petitioner at the time of his direct appeal that he could have raised all of the foregoing claims before the Utah Supreme Court. Apparently he chose not to do so. Moreover, Petitioner alleges no facts demonstrating that the failure to raise these claims was the result of ineffective assistance of counsel. It follows that these claims are procedurally barred pursuant to Section 78-35a-106(1)(c) and Section 78-35a-106(2). Respondent, therefore, is entitled to summary judgment dismissing these claims.

III. Claims for Which Respondent Has Requested Summary Judgment and No Objection Was Raised in Petitioner's Opposition Memorandum.

Petitioner did not respond to Respondent's request that the court grant summary judgment on each of the following claims raised in the second amended petition:

1) Claim 28 asserting that appellate counsel was ineffective because he failed to appeal the trial court's denial of Petitioner's request to argue as a mitigating circumstance the fact that his co-defendant only received a sentence of life in prison; and

2) Claim 31 asserting that Petitioner's constitutional rights are being violated because his post-conviction counsel do not satisfy the American Bar Association Guidelines (ABA Guidelines) for attorneys representing capital post-conviction petitioners.

Rule 65C of the Utah Rules of Civil Procedure requires a petitioner to set forth "in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief." Utah R. Civ. P. 65C(c)(3). Moreover, "the petitioner shall [also] attach to the petition . . . affidavits, copies of records and other evidence in support of the allegations." Utah R. Civ. P. 65C(d)(1). Even a generous reading of the foregoing claims set forth in Petitioner's second amended petition cannot overcome his failure to provide sufficient facts which, if proven and believed, would warrant a grant of relief on these post-conviction claims. Indeed, it was for this reason that Respondent filed its motion for summary judgment.

By not opposing Respondent's request for summary judgment or attempting in any way to cure the pleading deficiencies related to these claims, Petitioner has failed to show that any genuine issue exists with respect to the issues they raise. Respondent therefore is entitled to summary judgment dismissing claims 28 and 31.

IV. Newly Discovered Evidence Claim.

Petitioner's initial claim for relief is based upon his assertion that he has new evidence of perjury or inconsistent testimony by Dr. Stephen Golding, one of the forensic psychologists that evaluated Petitioner as part of the competency determination. During the competency hearings, Dr. Golding apparently testified that Petitioner could be found "situationally competent," that is, competent in some situations, but not competent in others. However, Petitioner contends that during the recent competency hearings held in the case of *State v. Brian Mitchell*, case no. 031901884 (3rd District Court, Salt Lake County, State of Utah), Dr. Golding took a position contrary to his testimony in Petitioner's competency proceedings, specifically stating that situational competence is not a valid diagnosis or theory.

It is absolutely clear that neither Petitioner nor his counsel could have known about the evidence of Dr. Golding's claimed change of heart concerning situational competence at the time of Petitioner's trial and sentencing or discovered it through the exercise of reasonable diligence as it first occurred in the relatively recent *Mitchell* proceedings. However, whether Dr. Golding in fact subsequently took a contradictory position from that which he took during Petitioner's competency proceedings, and therefore, whether newly discovered evidence actually exists, is impossible for the court to judge because Petitioner has failed to provide the court with transcripts of Dr. Golding's testimony, either from Petitioner's competency hearings or the competency hearings in the *Mitchell* case. Furthermore, even assuming that Dr. Golding actually made contradictory statements concerning "situational competence," Petitioner never expressly states for what purpose he would use this newly discovered evidence. Indeed, based upon the information Petitioner does provide, the court can apprehend no purpose for its use

other than as impeachment evidence against Dr. Golding.

However, because Petitioner cannot prevail on this post-conviction proceeding unless the newly discovered evidence is more than merely impeachment evidence,[4] *see* Utah Code Ann. § 78-35a-104(e)(iii), Petitioner's claim fails as a matter of law. Respondent is entitled to summary judgment dismissing this claim.

V. Ineffective Assistance of Trial Counsel Claims.

1. Claim 12 (Partial).

In claim 12 (partial), Petitioner argues that his trial counsel was ineffective because he failed to request that the jury be sequestered. In support of this claim Petitioner alleges that during trial one of the jurors spoke with fellow church members about the case and indicated that he was having trouble with the decisions he had to make. He was given a "blessing" and apparently told that Petitioner was evil and that he should not be deceived by Petitioner. Following this event, Petitioner asserts that "the juror felt compelled that he should go forward and quietly find the Petitioner guilty and sentence him to death." Second Am. Pet. at 10. However, the juror subsequently revealed his discussions with church members to counsel and the trial court and the juror was removed from the jury panel. At its heart, Petitioner's argument

[4] The court is aware that the Utah Supreme Court has recently stated, albeit as dictum, "that newly discovered impeachment evidence *can* justify the granting of a new trial in certain situations." *State v. Pinder*, 2005 UT 15, ¶66 n.11 (2005) (emphasis added). However, at the same time the Supreme Court declined "to address the issue of whether the Post-Conviction Remedies Act's disallowance of post-conviction relief on the basis of newly discovered impeachment evidence is consistent with our case law predating that act and what effect, if any, such an inconsistency may have." *Id.* In any event, the use of Petitioner's alleged newly discovered evidence as impeachment evidence is not, in my view, the type of impeachment evidence that would justify the granting of a new trial as Dr. Golding was only one of a number of mental health evaluators who testified about Petitioner's mental condition and it appears that he was an important, but not a key witness. However, without a transcript of the hearing it is impossible to fully evaluate the extent of his importance.

is that because trial counsel failed to request that the jury be sequestered, Petitioner was denied his constitutional right to the jury that had been selected and thereby lost "the advantage of perhaps one juror who would have voted for life without parole, thereby sparing the Petitioner's life." *Id.*

In response to this claim, Respondent correctly argues that Petitioner is constitutionally entitled to have a fair and impartial jury hear his case and decide his punishment. *See State v. Wach*, 2001 UT 35, ¶36, 24 P.3d 948 ("Both the United States Constitution and the Utah Constitution guarantee an accused the right to a fair and impartial jury."). However, Respondent also correctly argues that Petitioner is "not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). *See also State v. Chatwin*, 2002 UT App 363, ¶19, 58 P.3d 867 ("[T]he Constitution does not guarantee either the State or a defendant a jury comprised of any specific gender balance or composition."); *State v. Tillman*, 750 P.2d 546, 575 (Utah 1987) (same).

In this case Petitioner does not argue that he was denied an impartial jury, only that he was deprived of one of the originally impaneled jurors, one who may potentially have been a more sympathetic juror.[5] He has not shown, however, that the jury that deliberated his fate was not impartial. The constitution requires no more. Petitioner has not shown that there is any genuine issue with respect to whether trial counsel's performance fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Respondent is entitled to summary judgment dismissing claim 12 (partial).

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[5] It seems clear to this court that had the juror at issue been retained on the jury and the death penalty still imposed, given the facts asserted in the Second Amended Petition, Petitioner likely today would be arguing that retention of that juror was improper.

2. Claim 20 (Partial).

In claim 20 (partial), Petitioner argues that his federal habeas corpus counsel was ineffective because, after the Tenth Circuit vacated Petitioner's conviction and sentence, counsel failed to file the Order of Release he had prepared, thereby resulting in Petitioner being transferred from the Utah State Prison to the Utah County Jail without being arrested on a warrant. Petitioner contends that this failure resulted in an unconstitutional seizure which has continued to the present day. Respondent argues that to the extent Petitioner is claiming ineffective assistance of counsel, his claim necessarily fails because he is not constitutionally entitled to the effective assistance of federal habeas corpus counsel. Moreover, the Tenth Circuit indicated that Respondent was free to retry Petitioner and, when Respondent chose that option, Petitioner was not entitled to release from custody.

As Respondent correctly argues, there is no federal constitutional right to habeas corpus counsel. *See Johnson v. Avery*, 393 U.S. 483, 488 (1969) ("It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief."). Moreover, because "ineffective assistance of counsel claims spring from the right to counsel contained in the sixth amendment, it follows that there is no constitutional underpinning for the claimed right to effective assistance [of] . . . habeas [corpus counsel]." *Blair v. Armontrout*, 916 F.2d 1310, 1332 (8th Cir. 1990). *See also Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (where there is no constitutional right to counsel, there can be no deprivation of effective assistance). Therefore, Petitioner cannot show that any genuine issue exists with respect to whether his federal habeas corpus counsel was ineffective in not filing the Order of Release that had been prepared. Respondent is

entitled to summary judgment dismissing claim 20 (partial).

3. Claim 22.

In claim 22, Petitioner argues that his trial counsel was ineffective because he failed to hire effective investigators to interview witnesses and to discover whether evidence had been tampered with or whether exculpatory evidence existed that would have been helpful to Petitioner. Respondent argues that Petitioner has failed to identify (1) any facts suggesting the possibility of evidence tampering; (2) any facts trial counsel had a constitutional duty to discover; or (3) any facts that would have made a more favorable outcome at either phase of the trial reasonably likely.

There is no question that trial counsel bears the responsibility of conducting a "substantial investigation into each of the plausible lines of defense." *Strickland*, 466 U.S. at 681. Nevertheless, in order to avoid summary judgment, Petitioner must do more than simply "rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Utah R. Civ. P. 56(e). Indeed, Rule 65C of the Utah Rules of Civil Procedure requires Petitioner to set forth "in plain and concise terms, *all* of the facts that form the basis of [his] claim to relief." Utah R. Civ. P. 65C(c)(3)(emphasis added). This includes "attach[ing] to the petition . . . affidavits, copies of records and other evidence in support of the allegations." Utah R. Civ. P. 65C(d)(1). However, as repeatedly pointed out by Respondent, Petitioner's pleadings merely assert, without any factual support whatsoever, that trial counsel was ineffective because he failed to adequately investigate the case. Petitioner has failed to set forth any facts he contends should have alerted trial counsel that

additional investigation was warranted or any facts which a more extended investigation would have uncovered. Without these facts, Petitioner cannot show that there is any genuine issue with respect to whether trial counsel performed deficiently or, even if he did, that the deficient performance was prejudicial. Respondent is entitled to summary judgment dismissing claim 22.

4. Claim 23.

In claim 23, Petitioner argues that his trial counsel was ineffective because he failed to hire a mitigation expert to ascertain and develop mitigating evidence. Respondent argues that Petitioner has failed to "allege[] specific facts about how the failure affected him other than to point out that his brother Dan received a life sentence." Resp't Mem. in Supp. at 10.

The Utah Supreme Court has held that, although "[d]efense attorneys need not present all evidence uncovered by a mitigation workup, . . . they absolutely must perform one." *State v. Taylor*, 947 P.2d 681, 687-88 (Utah 1997). In conducting a mitigation workup, trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, the *Strickland* court has clearly held that there is no "checklist for judicial evaluation of attorney performance . . . [and] [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Indeed, the adoption of hard and fast rules that a defense attorney must follow in order to effectively represent a capital defendant "would interfere with the 'constitutionally protected independence of counsel' at the heart of *Strickland*." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (quoting *Strickland*, 466 U.S. at 689).

While it may be true that mitigation specialists are often helpful in assisting trial counsel to perform their required mitigation investigation, such specialists are not the only manner in which a mitigation workup may be accomplished. Because trial counsel is constitutionally permitted the discretion to perform a mitigation investigation in the manner he believes will best represent the interests of his client, it follows that counsel also must be allowed the discretion to determine whether he will retain the services of a mitigation specialist. Because the hiring of a mitigation specialist is discretionary, in order for Petitioner to avoid summary judgment on his claim, he must allege specific facts demonstrating that there was a particularized need for a mitigation specialist such that trial counsel's decision not to hire one constituted deficient performance and, if so, why counsel's failure was prejudicial. Petitioner has provided the court with no such facts. Therefore, he has not shown that any genuine issue exists with respect to whether trial counsel was ineffective in opting not to hire a mitigation specialist. Respondent is entitled to summary judgment dismissing claim 23.

5. Claims 11 (Partial) and 24.

In claim 11, Petitioner makes the general claim that his trial counsel was ineffective because he "did not do an appropriate analysis or investigation into mitigating factors." Second Am. Pet. at 9. More specifically, in claim 24, Petitioner argues that his trial counsel was ineffective because he failed to present the following available mitigating evidence during the penalty phase of the trial: educational records, mental health records, psychological test results, National Guard records, Utah County Jail records, and evidence of childhood issues, family background, physical, verbal, and emotional abuse, and childhood illnesses and injuries that could have been testified about by family members and that were found in Petitioner's journal

entries. According to Petitioner, had trial counsel discovered and presented these mitigating circumstances, the outcome of the penalty phase might have been different. Respondent argues, on the other hand, that, with the exception of Petitioner's "unremarkable" National Guard records, trial counsel overlooked no relevant mitigating evidence. As a result, Respondent contends that Petitioner cannot show that trial counsel provided ineffective assistance with respect to the investigation and presentation of mitigating evidence.

As previously noted, the Utah Supreme Court has held that trial counsel in a capital case must perform a mitigation investigation. In conducting a mitigation workup, trial "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, as noted in *Wiggin*s, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins*, 539 U.S. at 533. *See also Taylor*, 947 P.2d at 687 ("Defense attorneys need not present all evidence uncovered by a mitigation workup."). The standard is simply that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Id.* (quoting *Strickland*, 466 U.S. at 690-91).

Petitioner fails to provide any convincing argument that trial counsel performed deficiently in conducting a mitigation workup and presenting mitigating evidence. However, he has submitted a social history of his life that he contends contains mitigating evidence that could, and should, have been investigated and presented by trial counsel during the penalty phase of the

trial. As Respondent details, however, with the exception of Petitioner's National Guard records, all areas of mitigating evidence Petitioner claims was not investigated or presented, was in fact laid before the sentencing authority during the guilt or innocence phase of the trial. This included evidence of childhood issues, physical, verbal, and emotional abuse directed toward Petitioner by his father, illnesses and injuries suffered by Petitioner, Petitioner's performance in school, mental health records and psychological test results, entries from Petitioner's journal, Petitioner's character, Dan Lafferty's influence on Petitioner, and Petitioner's conduct while incarcerated in the Utah County Jail and the Utah State Prison. *See* Resp't Mem. in Supp. at 27-46.

In addition, Respondent also details the areas of mitigating evidence argued by trial counsel during the penalty phase. These included Petitioner's lack of a criminal history, that Petitioner acted under the domination of his brother, Dan, that Petitioner was merely an accomplice in the homicides and that his participation was relatively minor, that Petitioner suffered from a mental illness and could not appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law, that Petitioner was influenced by a dysfunctional family and was terrorized by his father, that Petitioner was remorseful for the murders, that Petitioner exhibited good behavior while incarcerated, that Dan, not Petitioner, was the actual murderer, and, finally, that death was not the appropriate punishment for Petitioner based upon the circumstances of the case. *See id.* at 46-51. The only conclusion that can be drawn from this detailed analysis is that Petitioner's proffered social history contains no relevant mitigating evidence that trial counsel should have investigated and presented, but failed to do so.

Petitioner can only avoid summary judgment on this claim by specifically identifying

some relevant mitigating evidence that trial counsel should have investigated and presented but did not. Unfortunately, Petitioner fails to allege any such facts in his opposition memorandum.[6] Without these facts, Petitioner has not demonstrated that any genuine issue exists with respect to whether trial counsel was ineffective in investigating and presenting mitigating evidence.

Petitioner also argued during oral argument that even if most of the mitigating evidence trial counsel relied upon was presented during the guilt or innocence phase of the trial, counsel was nevertheless obligated to reintroduce that evidence to the sentencing authority at the penalty phase. Petitioner contends that counsel's failure to do so constituted ineffective assistance of counsel. Again, Petitioner has provided no legal authority suggesting that in order for trial counsel to perform effectively, he must reintroduce at the penalty phase all mitigating evidence that may have been presented during the guilt or innocence phase. Indeed, Petitioner cannot point to any legal authority for this position.

As noted previously, the United States Supreme Court has expressly held that no "checklist for judicial evaluation of attorney performance . . . [and] [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Indeed, the adoption of hard and fast rules that a defense attorney must follow in order to effectively represent a capital defendant "would interfere with

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[6] The court agrees that trial counsel's failure to present Petitioner's National Guard records is inconsequential and cannot support any finding that trial counsel's performance was deficient or, even if it was, that Petitioner was prejudiced by this failure. As noted by Respondent, "[e]ven [P]etitioner's current mitigation specialist admits that [P]etitioner's 'time spen[t] in the National Guard is rather unremarkable as part of his social history.'" Resp't Mem. in Supp. at 51 (quoting Pet'r Social History at 13).

the 'constitutionally protected independence of counsel' at the heart of *Strickland*." *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 689).

Moreover, the Utah Supreme Court has specifically held that the sentencing authority at the penalty phase of a capital trial is entitled to consider all of the aggravating and mitigating evidence presented during the guilt or innocence phase. *See Lafferty II*, 2001 UT 19 at ¶127 ("Additionally, just as aggravating factors from the guilt phase of the trial may be considered at the penalty phase, so may any mitigating evidence or factors presented in the case-in-chief."). It follows from this holding that trial counsel does not act deficiently in choosing not to reintroduce at the penalty phase of a trial all of the mitigating evidence introduced during the guilt or innocence phase. In addition, it is clear in the present case that trial counsel repeatedly referred to mitigating evidence presented in the guilt or innocence phase in making his argument against a death sentence during the penalty phase. This included mitigating evidence related to physical, verbal, and emotional abuse and illnesses and injuries suffered by Petitioner, Petitioner's performance in school, his mental health records and psychological test results, entries from Petitioner's journal, Petitioner's character, his co-defendant's on Petitioner, and Petitioner's conduct while incarcerated in the Utah County Jail and the Utah State Prison.

For the foregoing reasons, Respondent is entitled to summary judgment dismissing claims 11 (partial) and 24.

6. Claim 25.

In claim 25, Petitioner argues that he received ineffective assistance of counsel because trial counsel was not qualified under Utah law or the ABA Guidelines to be appointed to represent a capital defendant. Respondent argues that Petitioner had no constitutional right to

trial counsel who satisfied certain qualifications and, therefore, even if counsel did not satisfy the specific requirements enumerated in Rule 8 of the Utah Rules of Criminal Procedure or the ABA Guidelines, this cannot serve as a basis for asserting an ineffective assistance of counsel claim.

There is no specific language in the Utah Constitution requiring counsel in capital cases to satisfy certain qualifications in order to provide effective representation. Rule 8, however, does specifically state that when an indigent defendant is charged with a capital offense, the trial court must appoint two or more attorneys to represent the defendant and that the trial court must make a finding that counsel are "proficient in the trial of capital cases." Utah R. Crim. P. 8(b). The rule then mandates that in making this finding, the trial court must ensure that the experience of appointed counsel satisfy certain minimum requirements set forth in subsections (b)(1) through (b)(4). However, Rule 8 also states that "[m]ere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal." Utah R. Crim. P. 8(f). Thus, neither the language of the Utah Constitution nor the sole fact that an attorney may not have satisfied the requirements set forth in Rule 8 will support a finding that Petitioner's trial counsel was ineffective.

The same is also true with respect to the federal constitution. In the same way that *Strickland* does not set forth a rigid checklist or set of rules that trial counsel must satisfy in order to provide effective representation, *see Strickland*, 466 U.S. at 688-89, *Strickland* also does not set forth specific qualifications that trial counsel must meet in order to effectively represent a capital defendant. It is not enough to assert that trial counsel did not meet statutory criteria. Petitioner must demonstrate that trial counsel was ineffective. Petitioner cannot show that any

genuine issue exists with respect to whether trial counsel provided ineffective assistance because he was not "qualified" to represent Petitioner under Utah law or the ABA Guidelines. Respondent is entitled to summary judgment dismissing claim 25.

7. Claim 26.

In claim 26, Petitioner argues that his trial counsel was ineffective because he failed to object to the prosecutor's statement during closing argument at the penalty phase that the punishment for a fifteen-month-old girl should be greater than the punishment for the death of an adult. As a result of this failure, Petitioner argues that when he raised the issue of the prosecutor's improper statements on appeal, he was required to rely on a more burdensome plain error analysis. Respondent contends that Petitioner cannot prevail on his claim because the very factors Petitioner would have been required to prove in order to succeed on his prosecutorial misconduct claim on appeal were expressly rejected by the Utah Supreme Court.

During closing argument at the penalty phase of Petitioner's trial, the prosecutor commented to the sentencing authority that

> "if you determine that the defendant deserves life without parole before we even consider [the child victim] lying dead in her crib, before we ever consider that the second person he killed was a 15-month-old infant, then there's only one punishment left that is meaningful, and that is death."

Lafferty II, 2001 UT 19 at ¶91. Because trial counsel did not make a contemporaneous objection to this statement, Petitioner contends that when he raised the issue of prosecutorial misconduct based upon the prosecutor's statements, he was forced to demonstrate to the Utah Supreme Court not only that the prosecutor's comments "call[ed] to the attention of the jurors matters they would not be justified in considering in determining their verdict and . . . [that] the error [was]

substantial and prejudicial such that there [was] a reasonable likelihood that in its absence, there would have been a more favorable result," *id.* at ¶90, but also that the statements were obviously improper. *See State v. Emmett*, 839 P.2d 781, 785 (Utah 1992) (plain error requires a defendant to "show that the prosecutor's remarks were obviously improper.").

However, as Respondent has argued, even if trial counsel had made a contemporaneous objection to the prosecutor's statement, and thus avoided having to demonstrate obvious impropriety, the Supreme Court specifically held that the statement was neither inflammatory nor prejudicial. *See Lafferty II*, 2001 UT 19 at ¶¶92-93. Petitioner cannot show that any genuine issue exists with respect to whether trial counsel was ineffective in not objecting to statements made by the prosecutor during closing arguments at the penalty phase. Respondent is entitled to summary judgment dismissing claim 26.

VI. Ineffective Assistance of Appellate Counsel Claims.

1. Claim 27.

In claim 27, Petitioner argues that his appellate counsel was ineffective because he failed to appeal the change of venue issue. A similar claim was raised and rejected in Petitioner's first direct appeal, *Lafferty I*, 749 P.2d at 1240, but was not raised after Petitioner's re-trial.

Had the change of venue issue been raised on appeal, the standard of review would have been abuse of discretion. *State v. Widdison*, 2001 UT 60, ¶38, 28 P.3d 1278. *See also State v. Stubbs*, 2005 UT 65, ¶13, 535 Utah Adv. Rep. 47. In determining whether an abuse of discretion has occurred, the Utah Supreme Court distinguishes situations where a jury has already reached a verdict and those where the jury has not yet been impaneled. Here, where the jury had already reached a verdict before appeal, the Supreme Court would have "examine[d] whether defendant

was ultimately tried by a fair and impartial jury." *Id.* (citing *Lafferty I*, 749 P.2d at 1240). Contrary to Petitioner's argument, the standard set forth in *State v. James*, 767 P.2d 549 (Utah 1989) is not the proper standard, although the factors listed may be useful in assessing whether a defendant has been tried by a fair and impartial jury. *See Stubbs*, 2005 UT 65 at ¶17 ("[T]he evaluative criteria established in *James* can, and often should, play a role in assessing the ultimate question asked by *Widdison*: whether the defendant in fact was tried by a fair and impartial jury.").[7]

Here, I am unaware of any disputed material facts sufficient to overcome summary judgment on the issue of appellate counsel's claimed ineffectiveness in omitting the venue issue. In order to avoid summary judgment, Petitioner has the burden of pointing to genuine issues of material fact showing that the venue issue was a "dead-bang winner," or more specifically, that the venue issue was (1) obvious from the trial record and (2) probably would have resulted in reversal on appeal. However counsel has not pointed to any specific evidence showing that any juror was biased. Petitioner therefore does not meet his burden and Respondent is entitled to summary judgment dismissing claim 27.

2. Claim 29.

In claim 29, Petitioner argues that he received ineffective assistance of appellate counsel because counsel was not qualified to handle a death penalty appeal under the then-existing Utah rules of criminal procedure or the ABA Guidelines. Respondent argues that Petitioner had no

[7]*State v. James* focuses on the community attitudes concerning the alleged offense and articulates four factors that may be relevant, namely (1) the standing of the victim and the accused in the community, (2) the size of the community, (3) the nature and gravity of the offense, and (4) the nature and extent of publicity, but these factors are not controlling. *See State v. James*, 767 P.2d 549, 552 (Utah 1989).

constitutional right to trial counsel who satisfied certain qualifications and, therefore, even if counsel did not satisfy specific qualifications enumerated in Rule 8 of the Utah Rules of Criminal Procedure or the ABA Guidelines this cannot serve as a basis for asserting an ineffective assistance of counsel claim.

This is a corollary claim to claim 25 discussed above with respect to trial counsel. As noted there, no specific language in the Utah Constitution requires appellate counsel in capital cases to satisfy certain qualifications in order to provide effective representation. Rule 8 provides that when an indigent defendant has been sentenced to death, the trial court must appoint one or more attorneys to represent the defendant on appeal and that the trial court must make a finding that counsel is "proficient in the appeal of capital cases." Utah R. Crim. P. 8(d). The rule then mandates that in making this finding, the trial court must ensure that the experience of appointed counsel satisfy certain minimum requirements set forth in subsections (d)(1) and (d)(2). However, Rule 8 also states that "[m]ere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal." Utah R. Crim. P. 8(f). Thus, neither the language of the Utah Constitution nor the sole fact that an attorney may not have satisfied the requirements set forth in Rule 8 will support a finding that Petitioner's appellate counsel was ineffective because he did not satisfy certain qualifications set forth in Utah law.

The same is also true with respect to the federal constitution. Because the "standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel," *Bruner*, 920 P.2d at 1157; in the same way that

Strickland does not set forth a rigid checklist or set of rules that counsel must satisfy in order to provide effective representation, *see Strickland*, 466 U.S. at 688-89, *Strickland* also does not set forth specific qualifications that counsel must meet in order to effectively represent a capital defendant on appeal. Petitioner cannot show that any genuine issue exists with respect to whether appellate counsel provided ineffective assistance because he was not "qualified" to represent Petitioner on appeal under Utah law or the ABA Guidelines. Respondent is entitled to summary judgment dismissing claim 29.

VII. Claims Related to the Constitutionality of Utah's Death Penalty Scheme.

1. Claim 36.

In claim 36, Petitioner argues that as a result of Utah's death penalty scheme, his punishment has been cruel and unusual in violation of his constitutional rights because he has been on death row for approximately 20 years with limited access to prison programs, health care, and interaction with others. Respondent argues that the PCRA only "permits post-conviction relief for constitutional defects in how a conviction is obtained or a sentence is imposed." Resp't Mem. in Supp. at 57. Because Petitioner's complaint about his conditions of incarceration have no bearing whatsoever on how his conviction was obtained or how his sentence was imposed, his claim fails as a matter of law.

As argued by Respondent, the PCRA specifically sets forth the exclusive grounds for relief that a post-conviction petitioner may rely upon in raising a claim related to his sentence. These are that "the sentence was imposed in violation of the United States Constitution or Utah Constitution . . .; the sentence was imposed in an unlawful manner . . .; the petitioner had ineffective assistance of counsel . . .; or . . . newly discovered material evidence exists that

requires the court to vacate the . . . sentence." Utah Code Ann. § 78-35a-104(1)(a), (d)-(e). In his claim, Petitioner is only challenging his sentence of death to the extent that it has resulted, in his view, in certain untoward consequences for him while waiting to be executed, namely, that life on death row limits his access to prison programs, health care, and interaction with others. Thus, Petitioner is basically arguing that but for his sentence of death, he would not be on death row where, he contends, his conditions of confinement constitute cruel and unusual punishment. In challenging his sentence, Petitioner has raised none of the foregoing grounds for relief required by the PCRA. His claim necessarily fails as a matter of law and Respondent is entitled to summary judgment dismissing claim 36.

2. Claim 39.

In claim 39, Petitioner argues that death by firing squad constitutes cruel and unusual punishment. This is borne out, he argues, by recent legislation in Utah abolishing death by firing squad and mandating lethal intravenous injection as the sole method of execution. *See* Utah Code Ann. § 77-18-5.5. Respondent contends that at the time Petitioner was sentenced to death, death by firing squad was permitted but only if that method of execution was selected by the defendant. Because, pursuant to United States Supreme Court precedent, a defendant cannot select a method of execution and then challenge its constitutionality, Petitioner's claim fails as a matter of law. Petitioner responds that at the time he was sentenced to death, he was being represented by ineffective counsel and he was not competent. As a result, Petitioner contends that his selection of death by firing squad could not have been made knowingly and voluntarily and, therefore, he is entitled to challenge the constitutionality of death by firing squad.

Petitioner cites to no state or federal case law holding that death by firing squad is

unconstitutional. On the contrary, although of ancient origin, the United States Supreme Court held in the case of *Wilkerson v. Utah*, 99 U.S. 130 (1879) that "[c]ruel and unusual punishments are forbidden by the Constitution, but . . . the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment." *Id.* at 134-35. *See also Andrews v. Shulsen*, 802 F.2d 1256, 1275 n.16 (10th Cir. 1986) (holding that death by firing squad does not violate the Eighth Amendment); *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984) (citing the holding in *Wilkerson* that ". . . execution by shooting was not cruel and unusual.").

Petitioner contends that the recent enactment of Section 77-18-5.5 demonstrates that "the State's own action through the legislative and executive branch, have indicated that death by firing squad is cruel and unusual," Second Am. Pet. at 21. Yet nowhere in Section 77-18-5.5 is death by firing squad expressly declared to be unconstitutional. Moreover, simply because the new legislation abolishes death by firing squad, this does not warrant the conclusion that this method of execution was, or currently is, unconstitutional under either the state or federal constitutions. Indeed, Section 77-18-5.5 implies just the opposite.

The new legislation provides that "[i]f a court holds that execution by lethal injection is unconstitutional as applied, the method of execution for that defendant shall be a firing squad." Utah Code Ann. § 77-18-5.5(4)(b). If Petitioner's argument is correct, then in the event lethal injection is found to be unconstitutional in a particular case, Section 77-18-5.5 allows the state to resort to a method of execution that, according to Petitioner, the legislature has impliedly declared to be cruel and unusual by enacting Section 77-18-5.5. Such an obvious inconsistency clearly undermines the validity of Petitioner's argument. *See Griffin v. Oceanic Contractors,*

458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Petitioner has not shown that any genuine issue exists with respect to whether death by firing squad constitutes cruel and unusual punishment.[8] Respondent is entitled to summary judgment dismissing claim 39.

3. Claim 40.

In claim 40, Petitioner argues that in light of the United States Supreme Court's recent ruling that mentally retarded defendants cannot be subject to the death penalty, his execution would constitute cruel and unusual punishment because he has never had the chance to raise the issue whether he is mentally retarded. Respondent argues that Petitioner has not alleged sufficient facts demonstrating that he is mentally retarded. Therefore, he cannot prevail on his claim.

Consistent with the holding of *Atkins v. Virginia*, 536 U.S. 304 (2002), the Utah Code exempts from the death penalty any defendant the trial court determines to be mentally retarded. *See* Utah Code Ann. § 77-15a-101(1). According to this exemption statute, a defendant is mentally retarded if:

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[8] In his opposition memorandum in response to Respondent's motion for summary judgment, Petitioner asserts that at the time he was sentenced to death, he was being represented by ineffective counsel and he was not competent. He contends, therefore, that his choice to be executed by firing squad was not knowingly and voluntarily made. This, he asserts, allows him to challenge the constitutionality of death by firing squad. The claim that Petitioner's choice to be executed by firing squad was not knowingly and voluntarily made as a result of mental incompetence and ineffective assistance of counsel is, in the court's view, a new claim that was not previously raised in Petitioners second amended petition. However, raising new claims in a memorandum opposing summary judgment is improper. *See Holmes Development, LLC v. Cook*, 2002 UT 38, ¶31, 48 P.3d 895 ("A plaintiff cannot amend the complaint by raising novel claims or theories of recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah's pleading requirements."). Therefore, the court will not consider Petitioner's new claims.

> (1) the defendant has significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and
>
> (2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

Utah Code Ann. § 77-15a-102(1)-(2). Petitioner contends that he is mentally retarded, but he fails to allege sufficient facts demonstrating that he satisfies the foregoing standard for a finding of mental retardation. Although he does assert that his social history shows that in his life he "had a diminished capacity to communicate, to make conclusions from his mistakes, to engage in logical reasoning, [and] to control his impulses," Pet'r Opp. Mem. at 20, these alleged deficits fail to satisfy the above standard. Moreover, even if these deficits were relevant, Petitioner never demonstrates how they warrant concluding that his intellectual and adaptive functioning was subaverage.

Finally, and perhaps most telling, there is no indication from Petitioner that any subaverage intellectual or adaptive functioning he may have experienced manifested itself prior to age 22. Indeed, although Petitioner may have endured a traumatic childhood in a dysfunctional family, his social history clearly indicates that prior to 1963,[9] "he was a good and easy child to raise, suffering from no abnormalities. 'He seemed to progress through the normal stages of growth and development with no complications.'" Pet'r Social History at 4-5 (quoting P. Heinbecker's report of 11/28/84). "In 1960, [he] graduated from Payson High School. According to his school record he received a 3.2 GPA, well above average. . . . Teachers described him as well-behaved and a well-adjusted young man." *Id.* at 7. In his formative years,

[9] Petitioner was born on November 4, 1941. *See* Pet'r Social History at 4.

Petitioner "worked odd jobs commonly available to high school students, including farm work, gas station attendant, and labor work," *id.* at 13, and spent two years in the Army National Guard prior to his honorable discharge. *See id.* From 1960 to 1962, Petitioner served a two-year LDS mission to Florida and Georgia and, following his release, he married in 1963. *See id.* at 7. Finally, there is no indication from his social history that prior to 1963 Petitioner needed or received any type of mental health treatment or psychological evaluations. *See id.* at 14. Petitioner has failed to allege sufficient facts demonstrating that he could satisfy the statutory definition of "mentally retarded" for exemption from the death penalty. Thus, he has not shown that any genuine issue exists with respect to whether his execution would constitute cruel and unusual punishment on the ground that he never had the chance to raise the issue whether he is mentally retarded. Respondent is entitled to summary judgment dismissing claim 40.

4. Claim 44.

In claim 44, Petitioner argues that he was denied the effective assistance of counsel because his mental health difficulties prevented him from conscientiously waiving trial counsel's alleged conflict of interest resulting from counsel's prior representation of Petitioner's co-defendant, Dan Lafferty. He also contends that the trial court erroneously permitted trial counsel to represent Petitioner despite the presence of a conflict of interest. Respondent argues that Petitioner has failed to allege any facts demonstrating that his constitutional right to conflict-free counsel was violated. That is, Petitioner fails to show that an actual conflict of interest existed and that the conflict adversely affected trial counsel's performance. Without this showing, Respondent argues that Petitioner cannot prevail on his claim.

There is no question that Petitioner had a constitutional right to be represented by

conflict-free counsel during his trial. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."). As with any constitutional right, it is also true that the waiver of trial counsel's conflict must be knowing, intelligent, and voluntary. *See State v. Johnson*, 823 P.2d 484, 490-491 (Utah Ct. App. 1991) ("A defendant can generally waive his or her right to conflict-free counsel. To be valid, such a waiver must be knowing and intelligent, and made 'only after adequate warning by the [trial] court of the potential hazards posed by the conflict of interest and of the accused's right to other counsel.'" (quoting *United States v. Rodriguez*, 929 F.2d 747, 750 (1st Cir. 1991)).

In making this claim Petitioner essentially alleges that he did not "conscientiously" waive trial counsel's conflict. Yet, unless Petitioner is able to demonstrate that an actual conflict existed that prejudiced him, the waiver issue is moot. Thus, in order for Petitioner to avoid summary judgment on his claim, he must show that a genuine issue exists with respect to whether he was denied the effective assistance of counsel as a result of trial counsel's alleged conflict of interest. To do this, Petitioner must plead sufficient facts demonstrating that trial counsel had an actual conflict of interest and that the conflict adversely affected trial counsel's performance. *See State v. Lovell*, 1999 UT 40, ¶22, 984 P.2d 382.

Petitioner contends that his trial counsel did have an actual conflict of interest during trial as evidenced by the fact that his counsel previously represented Petitioner's co-defendant, Dan, on the same criminal allegations that Petitioner was facing. Petitioner argues that this created an obvious conflict because his interests and Dan's interests on the issue of guilt in committing the homicides were materially adverse. Thus, according to Petitioner, his trial counsel had an actual

conflict in his representation of Petitioner because counsel represented a co-defendant with contrary interests.

Petitioner, however, fails to refer to any decisions made or trial strategies relied upon by trial counsel that actually undermined Petitioner's interests in favor of his co-defendant's interests. Moreover, Dan was tried in 1985 and Petitioner's second trial occurred in 1996. Merely pointing out that Petitioner's trial counsel also represented his co-defendant on identical charges of capital homicide in a separate trial that occurred eleven years prior to Petitioner's trial is insufficient to show that trial counsel was actively representing conflicting interests that adversely affected counsel's performance during Petitioner's trial. Indeed, the Utah Supreme Court has suggested that in situations where an attorney is appointed to represent co-defendants at different times on charges arising from the same criminal episode, no conflict exists, potential or otherwise, once the charges against one co-defendant are concluded. *See Gardner*, 888 P.2d at 620.[10] Thus, Petitioner cannot avoid summary judgment on his claim because he has failed to show that any genuine issue exists with respect to whether his trial counsel had an actual conflict of interest and that the conflict adversely affected counsel's performance. Respondent is entitled to summary judgment dismissing claim 44.

VIII. Claims Raised in Part Two of Petitioner's Second Amended Petition.

In addition to the 47 claims raised in Part 1 of Petitioner's second amended petition, Petitioner asked that his counsel attach to his Second Amended Petition a Second Amended Writ

[10] Respondent also noted that counsel called Dan Lafferty as a witness, obtained admissions from Dan that he (Dan) actually committed the murders, and then vigorously argued during closing arguments and in the penalty phase that Petitioner should not receive a more severe sanction than Dan received, life in prison with the possibility of parole. This action by trial counsel does not demonstrate an alliance with his prior client, Dan, but just the opposite.

of Habeas Corpus Part 2, apparently written by Petitioner himself, in which he raises four claims: (1) evidence was planted at the trial proceedings by the prosecution; (2) his second trial violated his protection against double jeopardy; (3) after the Tenth Circuit Court of Appeals vacated Petitioner's first conviction and death sentence, Respondent failed to arrest, re-charge, or properly arraign him on the current charges; and (4) his counsel erroneously advised him not to file a 120-day disposition request.

With respect to the first claim of Part 2, although this claim could have been raised on appeal, Petitioner argues that it is not procedurally barred because he is alleging that appellate counsel was ineffective in failing to raise the claim. Therefore, pursuant to Section 78-35a-106(2), this is a viable claim that the court should consider. Respondent counters that summary judgment should be granted because Petitioner's claim does nothing more than repeat his ineffective assistance of counsel claim from claim 22.

As noted above, whether an appellate counsel's performance is ineffective is judged by the same standard that applies to judging the ineffectiveness of trial counsel. *See Robbins*, 528 U.S. at 285 ("[T]he proper standard for evaluating [petitioner's] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*."). *See also Bruner*, 920 P.2d at 1157 ("The standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel."). In order to avoid summary judgment on the claim that appellate counsel was ineffective in failing to raise the issue of planted evidence, Petitioner must show that there is a genuine issue of material fact with respect to whether appellate counsel failed to raise an issue which was obvious from the trial record and which probably would have resulted in reversal on appeal. *See Carter I*, 2001

UT 96 at ¶48.

Petitioner has alleged no facts in support of his ineffective assistance of appellate counsel claim other than to state that the failure to raise the claim on appeal itself demonstrates that appellate counsel was ineffective. Clearly, this is insufficient to show that appellate counsel's failure to raise Petitioner's claim was obvious from the trial record and probably would have resulted in reversal on appeal. Therefore, Respondent is entitled to summary judgment dismissing Petitioner's first claim in Part 2.

Petitioner argues in his second claim that his second trial violated his protection against double jeopardy. Respondent argues that this claim is procedurally barred because this is a claim that Petitioner raised on appeal and lost. Pursuant to Section 78-35a-106(1)(b), a post-conviction petitioner is not entitled to relief on a claim that "was raised or addressed . . . on appeal." Petitioner raised the double jeopardy issue before the Utah Supreme Court on direct appeal and the Court rejected Petitioner's claim. *See Lafferty II*, 2001 UT 19 at ¶¶142-149. As a result, Petitioner's claim is procedurally barred. Therefore, Respondent is entitled to summary judgment dismissing Petitioner's second claim in Part 2.

Petitioner's third claim is that after the Tenth Circuit Court of Appeals vacated Petitioner's first conviction and death sentence, Respondent failed to arrest, re-charge, or properly arraign him on the current charges. Respondent contends that summary judgment should be granted on this claim because no authority exists "requir[ing] the State to formally rearrest, recharge, and rearraign a defendant who has been convicted and is in custody, but is granted a new trial." Resp't Mem. in Reply at 22. Petitioner does not directly address this issue in his opposition memorandum.

Rule 65C of the Utah Rules of Civil Procedure requires a petitioner to set forth "in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief." Utah R. Civ. P. 65C(c)(3). Moreover, "the petitioner shall [also] attach to the petition . . . affidavits, copies of records and other evidence in support of the allegations." Utah R. Civ. P. 65C(d)(1). Petitioner's claim cannot overcome his failure to provide sufficient facts which, if proven and believed, would warrant a grant of relief on this post-conviction claim. By not opposing Respondent's request for summary judgment or attempting to cure any pleading deficiencies, the court finds with respect to this claim that Petitioner has failed to show that any genuine issue exists with respect to the issue it raises. Respondent is entitled to summary judgment dismissing Petitioner's third claim in Part 2.

Petitioner argues in his fourth claim that his counsel was ineffective because he erroneously advised Petitioner not to file a 120-day disposition request. According to Petitioner, this advice prejudiced him because it "allow[ed] the press to pollute the jury pool with negative information which led to the fact that [Petitioner] could not get a fair and unbiased jury." Pet. Opp. Mem. at 22. Respondent argues that counsel's decision was reasonable because it allowed him time to prepare for both phases of Petitioner's capital trial.

For the reasons set forth by Respondent, and in light of all the circumstances, the court cannot conclude that counsel's advice fell outside the wide range of professionally competent assistance. Moreover, even if trial counsel's advice did constitute deficient performance, Petitioner provides no evidence that a biased juror was seated to hear his case and determine his punishment. Petitioner has failed to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland, 466 U.S. at 694. Petitioner has not shown that any genuine issue exists with respect to whether trial counsel was ineffective in advising Petitioner not to file a 120-day disposition request. Respondent is entitled to summary judgment dismissing Petitioner's fourth claim in Part 2.

CONCLUSION

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Based upon a careful consideration of all the pleadings in this case, I am of the view that Petitioner has failed to "set forth specific facts showing that there is a genuine issue for trial," Utah R. Civ. P. 56(e), with respect to any of the claims he raises. Respondent is entitled to summary judgment dismissing each of Petitioner's claims, which results in a dismissal of Petitioner's Second Amended Petition for Post-Conviction Relief.

Pursuant to Rule 7(f)(2), Utah Rules of Civil Procedure, Respondent's counsel is directed to prepare an appropriate order.

DATED this 29th day of November, 2005.

BY THE COURT:

_____

ANTHONY W. SCHOFIELD, JUDGE

CERTIFICATE OF DELIVERY

I certify that a true and correct copy of the foregoing Ruling on Motion to Dismiss and for Partial Summary Judgment was mailed or faxed on the 29th day of November, 2005, to the following:

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